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No. 83-1242

In the
Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON AND TAKERU KAMIYAMA,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Supplemental Brief for Petitioners

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This supplemental brief is filed by petitioners Moon and Kamiyama pursuant to Rule 22.6 of this Court. Petitioners wish to call to the attention of this Court the fact that, since the filing of their petition on January 26, 1984, the United States has filed a petition for certiorari in a case raising a legal issue closely related

to the third of the questions presented by the *Moon* petition[1] — namely, *United States* v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *petition for cert. filed*, No. 83-1297 (February 6, 1984; opposition due April 11, 1984) (hereinafter, "Dahl. Pet.").

In *Dahlstrom*, the court of appeals held that proof of willful violation of 26 U.S.C. § 7206(2) was insufficient because, in the court's view, the supposed illegality of tax-shelter transactions advocated by the defendants "was completely unsettled by any clearly relevant [prior] precedent." 713 F.2d at 1428. In *Moon*, petitioners contend that the instructions to the jury impermissibly invited conviction under 26 U.S.C. § 7206(1) on a substantive theory of taxability that was not only unsettled by prior precedent, but was altogether pioneering in light of prior rulings affirmatively suggesting that property acquired as petitioner Moon acquired the assets at issue here would *not* be taxable to him. *See* Moon Pet. at 23-26. Thus both cases raise parallel questions about when novelty or uncertainty in interpretation of the tax laws should preclude criminal conviction for willful violations of the Internal Revenue Code — questions that have been raised in a variety of cases attempting, without notable success, to explicate the splintered opinions of this Court in *James* v. *United States*, 366 U.S. 213 (1961). *See* Moon Pet. at 27-29. But the *Moon* case raises those questions in a context far more sympathetic to the taxpayer's position and, more to the point of this Court's exercise of its discretionary jurisdiction, does so in a context far more conducive to a holding broadly resolving the "confusion" the government concedes, *see* Dahl. Pet. at 18 n.15, *James* and its progeny have spawned.

Even if *Dahlstrom* were to be reviewed and reversed for the reasons the government plausibly urges, such a decision would

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[1] The third question presented by the *Moon* petition is the following: "Does the Due Process Clause permit use of a criminal prosecution to pioneer a novel and debatable theory of tax liability?" *See* Petition for Certiorari in *Moon and Kamiyama* v. *United States*, No. 83-1242 (hereinafter, "Moon Pet."), at i.

wholly fail to resolve the issues left open by the *James* series of decisions and squarely posed in *Moon*, for any *holding* by this Court in *Dahlstrom* would of necessity be too narrow, in at least four respects, to shed light on the basic dilemma of the taxpayer facing criminal prosecution for failing to report, as his own income, holdings of a sort previously characterized by government as nontaxable to him.

1. In *Dahlstrom*, the Government contends that the only novelty involved in the prosecution was that the precise version of sham transaction newly devised by the defendants had not yet been denounced as illegal in a prior ruling expressly directed to just such a scam. *See* Dahl. Pet. at 10-11, 29. In *Moon*, by contrast, petitioners contend not only that the taxpayer's treatment of the income as not reportable by him involved no such variation on a well-settled illegal theme, but indeed that prior rulings had strongly suggested the affirmative *legality* of that treatment. *See* Moon Pet. at 23-25.

2. In *Dahlstrom*, any novelty conceivably present in the tax theory invoked by the government went at most to a legal issue "wholly collateral" to the central issue of whether the transactions in question were a sham. *See* Dahl. Pet. at 19-22. In *Moon*, by contrast, the alleged novelty unmistakably goes to the admitted heart of the criminal prosecution — namely, to whether the property in question was beneficially owned by Reverend Moon rather than by the church he leads. *See* Moon Pet. at 23.

3. In *Dahlstrom*, the government contends that any due process danger arising from the unsettled illegality of various transactions should be negated by sufficient proof of subjective intent to create those transactions — as a sham — for the very purpose of evading taxes. *See* Dahl. Pet. at 20-21. In *Moon*, by contrast, the substantive tax violation itself is not defined in terms of any sham transaction, with the result that proof of subjective intent could at most negate a claim of insufficient notice, not a claim of undue government power to shape the criminal law to fit the accused

through a theory of liability that is radically novel at its core — as was the theory invoked by the government in *Moon*. *See* Moon Pet. at 26-27 & n.51.

4. The extent to which retrospective application of a novel and debatable theory of taxability poses special danger to activity protected by the First Amendment is an issue far more starkly posed in *Moon* than in *Dahlstrom*, as even the most cursory review of the plainly misguided First Amendment holding in *Dahlstrom* makes clear. *Compare* Moon Pet. at 27 & n.52 *and* 17-22 *with* Dahl. Pet. at 23-28.

So manifest are these distinctions between the two cases that no resolution of *Dahlstrom* could settle the issue presented in *Moon*, much less illuminate the broad issues left open by *James* and its offspring.

For these reasons, the very policy of clarity and consistency in national standards of tax law enforcement which the government seeks certiorari in *Dahlstrom* in order to promote, *see* Dahl. Pet. at 28-30, would be far better served by this Court's consideration of both *Moon* and *Dahlstrom* than by its review of *Dahlstrom* alone. For the differences that separate the two cases ensure that resolution solely of the narrow issue in *Dahlstrom* would give little guidance to federal prosecutors, the Internal Revenue Service, or the criminal tax bar, in resolving related issues.[2] Should this Court grant certiorari in *Dahlstrom*, therefore, it would advance the in-

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[2] That the *individuals* involved in *Moon*, and the religious beliefs that generated the unusual prosecution leading to their conviction, may seem *sui generis* should not be allowed to obscure the generality of the predicament that this conviction, and the circuit court ruling upholding it, lays bare. The very multitude of *amicus* briefs in support of plenary review herein, and the diversity of the groups represented, testifies to the difficulty of treating Reverend Moon as a containable class of one.

terests of economy and efficiency in the use of the dramatically overburdened resources of this Court for certiorari to be granted in *Moon* as well.[3]

Conclusion

Accordingly, the intervening filing of the Government's petition in *Dahlstrom* strongly supports granting certiorari with respect to the third issue in *Moon*.

Respectfully submitted,

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[3] Given the differences between *Moon* and *Dahlstrom*, *denial* of certiorari in *Dahlstrom a fortiori* would not counsel against a grant of certiorari in *Moon*. Indeed, should this Court leave standing the decision in *Dahlstrom*, the conflict between the Second and Ninth Circuits would call even more clearly for a grant of certiorari in *Moon*.